Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

EDGARDO TAVAREZ,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in selecting a criminal sentence, a trial court's reliance on conduct of which the defendant was acquitted by the jury violates the Fifth or Sixth Amendments to the U.S. Constitution.

PARTIES TO THE PROCEEDING

Petitioner is Edgardo Tavarez, defendant-appellant below.

Respondent is the United States, plaintiff-appellee below.

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Petitioner Edgardo Tavarez respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

Mr. Tavarez was sentenced by the District Court for the Southern District of Florida on August 16, 2007. The transcript of that proceeding is set forth in the appendix at 11a. The decision of the United States Court of Appeals for the Eleventh Circuit is available at 274 F. App'x 824 and reproduced in the appendix at 1a. The decision of the United States Court of Appeals for the Eleventh Circuit denying Mr. Tavarez's petition for *en banc* review is reproduced at 35a.

JURISDICTION

The district court in the Southern District of Florida had jurisdiction over this federal criminal case under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court denied Mr. Tavarez's petition for rehearing *en banc* on July 2, 2008. On September 23, 2008, Justice Thomas granted an application for an extension of time to file the petition until October 30, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the U.S. Constitution provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

STATEMENT OF THE CASE

This case involves the recurring and important question whether due process and the right to a jury trial permit a trial court, when sentencing a defendant, to rely on conduct of which a defendant was acquitted by the jury. Although the federal courts of appeal have upheld acquittal enhancements against constitutional attack, many state courts of last resort have invalidated them on federal due process grounds. Accordingly, in the very same regions of the country, criminal defendants are protected against being sentenced on the basis of conduct of which they were acquitted if their cases are in state, but not federal, court. This deep and entrenched conflict on a matter of fundamental constitutional law warrants the Court's review.

In *United States v. Booker*, 543 U.S. 220, 240 (2005), this Court recognized that it left open the constitutionality of acquittal enhancements in *United States v. Watts*, 519 U.S. 148 (1997). In particular, although *Watts* held that acquittal enhancements do not violate the collateral estoppel protections of the Double Jeopardy Clause, given the lower standard of proof applicable at sentencing, *Watts* did not address whether acquittal enhancements are constitutional under the Due Process Clause of the Fifth Amendment or under the Sixth Amendment. Justice Kennedy expressly noted in his dissent in *Watts* that reliance on acquitted conduct to increase a sentence raises "concerns about undercutting the verdict of acquittal." *Id.* at 170 (Kennedy, J., dissenting).

In the years since *Watts* was decided, this Court has issued a variety of decisions protecting the Sixth Amendment right to a jury trial. *See, e.g., Booker*, 543 U.S. 220; *Blakely v. Washington*, 542 U.S. 296 (2004);

Ring v. Arizona, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In each of these cases, the Court eschewed a formalistic approach that would have cast aside the protections of the Sixth Amendment at sentencing, asking instead whether the practice at issue offended the substantive right to a jury trial.

Nevertheless, the federal courts of appeal that have addressed this issue in the *Apprendi* era have held that acquittal enhancements are constitutional under the Due Process Clause of the Fifth Amendment and under the Sixth Amendment. Those courts have generally held that challenges to acquittal enhancements are barred either by *Watts* or the remedial holding of *Booker*. According to these courts, since the Guidelines are now advisory under *Booker*, consideration of acquitted conduct at sentencing does not violate due process or the right to a jury trial.

Those holdings are incorrect. As concurring and dissenting judges on federal appellate panels have correctly explained, *Watts* does not foreclose challenges to acquittal enhancements on grounds other than the Double Jeopardy Clause. In addition, *Booker* does not support – let alone compel – the conclusion that relying on acquitted conduct to increase a Guidelines range is permissible merely because that range is now advisory rather than mandatory. It is the trial court's reliance on conduct found by a jury to be a legal falsehood - under *any* sentencing scheme - that offends the Fifth and Sixth Amendment.

Indeed, while *Booker's* remedial holding does not legitimize acquittal enhancements, its *constitutional* holding shows why a constitutional violation takes place when a trial court sentences a defendant for conduct of which he was acquitted by a jury of his

peers. Reliance on acquitted conduct at sentencing dramatically undermines the authority of the jury's verdict. Accordingly, just as a court may not select a sentence outside of the maximum authorized by the jury, it may not consider facts – constituting separate *crimes* – that a jury has considered and rejected at trial. Acquittal enhancements also undermine both the historical role of the jury as an institutional bulwark against government overreaching and public confidence in the criminal justice system.

Although the federal courts of appeals have rejected challenges to acquittal enhancements, numerous state courts of last resort (including the high courts of Indiana, New Hampshire, North Carolina, and Wyoming) and other intermediate state appellate courts have struck down, on federal due process grounds, sentences imposed on the basis of acquitted conduct. In conflict with the decisions of federal appellate courts, these decisions hold that reliance on acquitted conduct in selecting a sentence offends due process. Criminal defendants in many states, therefore, are protected against being sentenced on the basis of conduct of which they were acquitted if their cases are pending in state, but not federal, court. The Court should grant the petition to resolve the question whether reliance on acquitted conduct at sentencing is consistent with federal due process and the right to a jury trial.

This case is also an ideal vehicle to do so. The facts of conviction found by the jury supported an advisory guideline sentence of between 63 and 78 months. Nevertheless, the district court imposed a sentence of 97 months based on its express finding by a preponderance of evidence that Mr. Tavarez committed the very same conduct of which the jury had acquitted

him at trial. There is therefore no question but that district court relied on acquitted conduct to determine Mr. Tavarez's sentence. The Court should grant review and hold that the sentence imposed here violates due process and the right to a jury trial.

A. Factual Background

Mr. Tavarez was arrested in Florida in January 2007 and charged with federal offenses related to the distribution of heroin. (*See* 2a.) A jury found Mr. Tavarez not guilty of using and carrying a firearm in relation to a drug trafficking offense, but deadlocked on the counts of whether Mr. Tavarez possessed and conspired to possess heroin with intent to distribute. (*Id.*) Mr. Tavarez was retried on the two remaining counts and a second jury found him not guilty of possession, but guilty of conspiracy. (4a.)

B. Sentencing Proceedings and Appeal

At sentencing for the single count of conviction, Mr. Tavarez's base offense level was 26, yielding a sentencing range of 63-78 months. (4a.) Over Mr. Tavarez's constitutional objection, the district court added two offense levels on the express grounds that Mr. Tavarez possessed a dangerous weapon in connection with the offense – the very same grounds the first jury had rejected in acquitting Mr. Tavarez of the gun charge. (5a.) This two-level enhancement resulted in a sentencing range of 78 to 97 months, and the district court sentenced Mr. Tavarez to the top of that guideline range. (5a-6a.) Accordingly, the district court added at least 19 months – and as much as 34 months – to Mr. Tavarez's sentence based on charged conduct as to which he had been acquitted by a jury of his peers.

Mr. Tavarez filed a timely appeal to the Eleventh Circuit, arguing that consideration of the firearm

charge was unconstitutional under the Fifth and Sixth Amendments. (9a.) On April 22, 2008, a panel of the Eleventh Circuit held that Mr. Tavarez's sentence was permissible as a matter of federal constitutional law. The court held that the sentence did not violate the principles of *Booker* because it did not exceed the statutory maximum for the offense of conviction. (*Id.*) The panel held that because the Guidelines are now advisory, the trial court was free to consider acquitted conduct in selecting any sentence below the statutory maximum. (*Id.*)

Mr. Tavarez filed a timely petition for rehearing and rehearing *en banc*. The Court of Appeals denied the petition on July 2, 2008. (35a.)

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS ARE DIVIDED AS TO WHETHER TRIAL COURTS MAY RELY ON ACQUITTED CONDUCT IN SELECTING A DEFENDANT'S SENTENCE.

The federal and state courts are deeply divided on the question whether due process permits a sentencing court to rely on acquitted conduct in selecting the sentence imposed. Although federal appellate courts have held that *Watts* and *Booker* foreclose challenges under the Due Process Clause and the Sixth Amendment, several jurists on federal appellate panels have disagreed, noting that *Watts* does not foreclose non-Double Jeopardy Clause challenges, and that acquittal enhancements are unconstitutional under this Court's recent Sixth Amendment decisions. And numerous state courts of last resort have held that reliance on acquitted conduct at sentencing violates federal due process. The Court should grant the petition to resolve this split on a fundamental question of federal constitutional law. *See* S. Ct. R.

10(b) (state-federal conflict warrants review); *see, e.g., Johnson v. California*, 545 U.S. 162, 164 (2005) (granting *certiorari* on a federal-state split where no disagreement existed among the federal courts); *United States v. Estate of Romani*, 523 U.S. 517, 521-22 (1998) (same).

1. Although the federal courts of appeal have all upheld acquittal enhancements following *Booker*,[1] that apparent uniformity masks important disagreements by federal appellate jurists. Individual judges of the courts of appeals have "strongly" contended that acquittal enhancements violate due process and the right to a jury trial. Judge Barkett of the Eleventh Circuit, for example, concurred in a decision approving the use of acquittal enhancements "only because" she felt "bound by Circuit precedent." *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., concurring). However, she "strongly believe[d] this precedent is incorrect, and that sentence

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[1] *See, e.g., United States v. Brika*, 487 F.3d 450, 458 (6th Cir.), *cert denied*, 128 S. Ct. 341 (2007); *United States v. Horne*, 474 F.3d 1004, 1006 (7th Cir.), *cert denied*, 127 S. Ct. 2957 (2007); *United States v. Mercado*, 474 F.3d 654, 657-58 (9th Cir. 2007), *cert denied*, 128 S. Ct. 1736 (2008); *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States v. Hayward*, 177 F. App'x 214, 215 (3d Cir.), *cert denied*, 127 S. Ct. 270 (2006); *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006), *cert denied*, 127 S. Ct. 1502 (2006); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), *cert denied*, 127 S. Ct. 691 (2006); *United States v. Vaughn*, 430 F.3d 518, 526-27 (2d Cir. 2005), *cert denied*, 547 U.S. 1060 (2006); *United States v. Magallanez*, 408 F.3d 672, 684-85 (10th Cir.), *cert denied*, 546 U.S. 955 (2005); *United States v. Duncan*, 400 F.3d 1297, 1304 (11th Cir.), *cert denied*, 546 U.S. 940 (2005); *United States v. Ashworth*, 139 F. App'x 525, 527 (4th Cir.), *cert denied*, 546 U.S. 1045 (2005).

enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment." As Judge Barkett explained, it "perverts our system of justice to allow a defendant to suffer punishment for a criminal charge for which he or she was acquitted," *id.* at 1350 (citations omitted).

Judge Fletcher reached a similar conclusion in dissenting from a panel decision of the Ninth Circuit, arguing that "[b]y considering acquitted conduct, a judge thwarts the express will of the jury...and imposes a punishment based on conduct for which the government tried, but failed, to get a conviction." *Mercado*, 474 F.3d at 662 (Fletcher, J., dissenting).

Judge Bright recently agreed, noting that "[p]ermitting a judge to impose a sentence that reflects conduct the jury expressly disavowed through a finding of 'not guilty' amounts to more than mere second-guessing of the jury – it entirely trivializes its principal fact-finding function." *United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J. concurring); *see also United States v. Pimental*, 367 F. Supp. 2d 143, 150 (D. Mass. 2005) (internal citation omitted) (finding that it makes "absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing" (internal citation omitted)).[2]

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[2] Even before *Apprendi* and *Watts*, courts and individual judges had been troubled by the use of acquitted conduct at sentencing. *See United States v. Putra*, 110 F.3d 705, 706 (9th Cir. 1997) (Hug, C.J., concurring) ("Sentencing on the basis of acquitted conduct gives the impression of a judge being able to second-guess a jury

In addition, several courts of appeal have also questioned whether *Watts* extends to the rights to a jury trial and due process after *Booker*. *See, e.g., United States v. Grier*, 475 F.3d 556, 568 n.8 (3d Cir. 2006) (finding the use of acquitted conduct to be consistent with the Fifth and Sixth Amendments, but acknowledging "that the statutory and constitutional underpinnings [allowing the use of acquitted conduct at sentencing] may be questioned by the Supreme Court's reasoning in *Booker*."), *cert. denied*, 128 S. Ct. 106 (2007); *United States v. Gray*, 362 F. Supp. 2d 714, 721 (S.D. W. Va. 2005) ("The reasoning in *Watts*, for example, was drawn into serious question by the constitutional majority in *Booker* ...."), *aff'd*, 491 F.3d 138 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 1226 (2008); *Pimental*, 367 F. Supp. 2d at 150 ("*United States v. Booker* substantially undermines the continued vitality of *United States v. Watts* both by its logic and by its words.").

These concerns recently led the Sixth Circuit openly to question the constitutionality of enhancements based on acquitted conduct. *See United States v. Conway*, 513 F.3d 640, 645 (6th Cir. 2008)

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that has acquitted a defendant, despite our explanations about burdens of proof."); *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) (remarking that the practice "is jurisprudence reminiscent of *Alice in Wonderland*"); *United States v. Hunter*, 19 F.3d 895, 897 & n.4 (4th Cir. 1994) (Hall, J., dissenting) ("[A] defendant ought not to be punished for a charge on which he has been acquitted in the very same proceeding. . . . [Doing so] mocks the themes of fair trial and fair sentence that resound in the Fifth, Sixth, and Eighth Amendments."); *United States v. Concepcion*, 983 F.2d 369, 393 (2d Cir. 1992) (calling the sentence reached in part on the basis of acquitted conduct "a stark example of the bizarre results that occasionally occur from a combination of the Sentencing Guidelines and the sentencing jurisprudence").

(rejecting argument that dismissed conduct may not be relied on at sentencing but noting that the defendant "has no jury verdict to point to as evidence that the conduct underlying the dismissed counts could not be – or should not be – relied upon by a judge at sentencing. For that reason alone, sentencing based on dismissed conduct stands on *far firmer ground* than sentencing based on acquitted conduct." (emphasis added)). The Sixth Circuit is currently considering the question *en banc*. *United States v. White*. See 503 F.3d 487 (6th Cir. 2007) (panel opinion withdrawn and judgment vacated pending rehearing) (No. 05-6596).

2. A number of state courts of last resort have held that a trial court violates due process if it relies on acquitted conduct in determining a sentence.

In *State v. Cote*, 530 A.2d 775, 785 (N.H. 1987), *discussed with approval in State v. Gibbs*, 953 A.2d 439, 440 (N.H. 2008), for example, the Supreme Court of New Hampshire considered the sentence of a defendant who was convicted of three charges but acquitted of five others. The trial court imposed the maximum sentence for the three charges, and while it was "unclear whether the court relied upon the probation report or the evidence adduced at trial, or both," the Court found "error in any case to the extent that evidence in the acquittals *may* have been considered in sentencing." *Id.* at 784 (emphasis added). It explained that an acquittal is a "'legal and formal certification of the innocence of a person who has been charged with crime.'" *Id.* (quoting Black's Law Dictionary 23 (1979)). "The concept is intertwined with the notion, so central to our system of justice, that until guilt is proven beyond a reasonable doubt, a defendant is innocent." *Id.*; see also *Id.* at 785 ("We think that the presumption of innocence is as

much ensconced in our due process as the right to counsel, and that a criminal defendant in Mr. Cote's position is entitled to its full benefit."). It thus concluded that reliance on acquitted conduct at sentencing violates due process. *Id.*

The Supreme Court of North Carolina likewise held that reliance on acquitted conduct at sentencing is "fundamentally inconsistent with the presumption of innocence itself" and therefore a violation of due process and fundamental fairness. *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988). The court noted that once "a defendant has been acquitted of a crime he has been 'set free or judicially discharged from an accusation; released from...a charge or suspicion of guilt.'" *Id.* at 138 (quoting *People v. Lyman*, 63 N.Y.S. 1062, 1065 (N.Y. 1900)). It concluded "that due process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element -- premeditation and deliberation -- ...after the jury had acquitted defendant of first degree murder." Id. at 139. The Supreme Court of Wyoming followed suit, adopting the holding in *Marley*. *Trusky v. State*, 7 P.3d 5, 13-14 (Wyo. 2000).

The Supreme Court of Indiana similarly bars reliance upon acquitted conduct in imposing sentences. *Gambill v. State*, 436 N.E.2d 301, 305 (Ind. 1982) ("It is clear that the trial court enhanced the sentence to compensate for what he believed to be an erroneous verdict. In so doing, he invaded the province of the jury.").[3]

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[3] Though the court did not identify any particular constitutional provision on which it relied, it fairly appears to have relied on federal constitutional standards. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985) ("[W]e will not assume that a state-court decision

Intermediate state appellate courts agree. The Appellate Division in New York has "repeatedly held that a sentencing court may not base its sentence on crimes of which the defendant was acquitted." *People v. Black*, 821 N.Y.S.2d 593, 596 (App. Div. 2006). The New York Appellate Division first held that the consideration by the sentencing court of a prior, reversed conviction for which the defendant was acquitted on retrial was a violation of the Due Process Clause, and later extended that rule to prohibit the use of all acquitted conduct at sentencing. *People v. Cwikla*, 400 N.Y.S.2d 35, 39-41 (App. Div. 1977) (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969)), *rev'd on other grounds sub nom.*, 386 N.E.2d 1070 (N.Y. 1979).

In *Doty v. State*, 884 So. 2d 547 (Fla. Dist. Ct. App. 2004) the Fourth District Court of Appeal agreed, holding that "[i]t is a violation of due process for the court to rely on conduct of which the defendant has actually been acquitted when imposing a sentence." *Id.* at 549. Indeed, in a previous decision, the court of appeal, relying on this Court's decision in *Townsend v. Burke*, 334 U.S. 736 (1948), announced in *Epprecht v. State*, 488 So. 2d 129 (Fla. Dist. Ct. App. 1986) that "it is fundamental that the due process clause prohibits a court from considering charges of which an accused has been acquitted in passing sentence." *Id.* at 131.[4]

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rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'" (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)).

[4] Other state supreme courts disagree. For example, the California Supreme Court recently rejected a challenge to acquittal enhancements. *See People v. Towne*, 186 P.3d 10, 24

3. These decisions create a square conflict on the question whether a trial court's reliance on acquitted conduct in selecting a criminal sentence violates due process. In the half-dozen states just described, criminal defendants cannot be sentenced on the basis of conduct of which they were acquitted if their cases are proceeding in state court. If their cases are proceeding in federal court, however, district courts can (and do) rely on acquitted conduct in selecting a sentence.

The conflict is not only deep and recurring, it is entrenched. All of the federal courts of appeal have sustained acquittal enhancements. What is more, several of the decisions of state high courts have either been issued or reaffirmed after *Watts*, *see, e.g.*, *Gibbs*, 953 A.2d at 440; *Trusky*, 7 P.3d at 13-14; *Black*, 821 N.Y.S.2d at 596; *Doty*, 884 So. 2d at 549. There is therefore no need or warrant for further percolation of the question presented.

II. RELIANCE ON ACQUITTED CONDUCT AT SENTENCING VIOLATES THE FIFTH AND SIXTH AMENDMENTS.

Although the conflict over the question presented alone warrants review, the decision below is also incorrect on the merits. A trial court's reliance on acquitted conduct to determine a sentence violates a defendant's Fifth and Sixth Amendment rights by rejecting the proper role of the jury as the arbiter of legal guilt. *First*, the practice trivializes the jury's decision to acquit. *Second*, the practice eliminates the jury's historical role as a bulwark against government

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(Cal. 2008) ("Permitting a judge to consider evidence of conduct underlying counts of which the defendant was acquitted does not in any way undermine the jury's role in establishing, by its verdict, the maximum authorized sentence).

excess. *Third*, the practice ignores that a crime is not a traditional sentencing factor, but instead a legal scheme comprised of constituent elements, each of which must be proved to a jury beyond a reasonable doubt. For each of these independent reasons, acquittal enhancements are unconstitutional.

1. Reliance on acquitted conduct at sentencing trivializes the jury's binding determination of the defendant's legal guilt. This Court has explained that the trial court's "authority to sentence derives *wholly* from the jury's verdict." *Blakely*, 542 U.S. at 305-06 (emphasis added). Just as courts may not direct a verdict of guilty and have no power to set aside an acquittal, courts therefore cannot treat a jury's acquittal as an act of calculated fact-finding by reconsidering the truth of a verdict at sentencing. *See Sparf v. United States*, 156 U.S. 51, 105-06 (1895) ("[I]n a criminal case, if the verdict is one of acquittal, the court has no power to set it aside . . . . [I]f the court [could] direct a verdict of guilty, it [could] do indirectly that which it has no power to do directly."). The jury's finding of legal innocence is absolute, and a court cannot impose a different finding, lest it "reduc[e] the jury's role 'to the relative importance of low-level gatekeeping.'" *Booker*, 543 U.S. at 230 (quoting *Jones v. United States*, 526 U.S. 227, 230 (1999)); *see also* James J. Bilsborrow, *Sentencing Acquitted Conduct to the Post-*Booker *Dustbin*, 49 Wm. & Mary L. Rev. 289, 322 (2007) ("Given the Court's repeated admonitions that the punishment must be authorized by the jury's verdict, it seems paradoxical to allow such judicial nullification.").

This Court's recent decisions likewise make clear that "it is not the abstract dignity of the statutory maximum that is at stake..., but the integrity of the

jury right itself, the cornerstone of our criminal justice system." *Faust*, 456 F.3d at 1350 (Barkett, J., concurring); *see also* Peter Erlinder, *"Doing Time"....after the Jury Acquits: Resolving the Post-Booker "Acquitted Conduct" Sentencing Dilemma* (forthcoming), *available at* http://ssrn.com/abstract=1095406 (arguing that "the minority view expressed in lower court cases, that 'acquitted conduct' may *never* be used by a sentencing court in light of *Apprendi* and *Blakely* (at least with respect to facts related to proof of the elements of the acquitted offense), is essentially correct as a matter of principle, and simple logic"). Andrew M. Levine, *The Confounding Boundaries of "Apprendi-land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 Am. J. Crim. L. 377, 438 (2002) ("Although the *Watts* Court clearly held that a judge may consider relevant conduct in calculating a defendant's Guidelines sentence, this stands directly in tension with *Apprendi's* concern for safeguarding a defendant's constitutional rights to due process, notice, and trial by jury."). As one district court summed up: "It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury...and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing." *Pimental*, 367 F. Supp. 2d at 150.

2. In addition, by revisiting the defendant's acquitted conduct at sentencing, a court also eliminates the jury's ability to act as a bulwark against an overreaching government. This Court has long recognized that the jury provides a defendant with "an inestimable safeguard against the corrupt or

overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). In its recent decisions, this Court has explained that the Framers conceived of the jury not only as a neutral fact-finder, but as a body able to exercise independent political power, making it "the great bulwark of [our] civil and political liberties" between the individual and the state. *Apprendi*, 530 U.S. at 477. As the Court explained in *Jones v. United States*, in England,

> [t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as "pious perjury" on the jurors' part.
>
> *Jones v. United States*, 526 U.S. 227, 245 (1999).

The Framers enshrined the right to a jury trial not despite this "mitigating power," but because of it. As the Court explained in Jones, the Framers drafted the Sixth Amendment in the wake of cases in England and the Colonies that saw juries acquit defendants who had been charged under unjust laws or who were being prosecuted for political reasons. "That this history had to be in the minds of the Framers is beyond cavil." *Id.* at 247. Accordingly, the authority of the jury on the defendant's culpability has been, and still is, a necessary element of the right to trial by jury, and "the judge's authority to sentence derives wholly from the

jury's verdict." *Blakely*, 542 U.S. at 306. "Without that restriction, the jury would not exercise the control that the Framers intended." *Id.* For this reason, as well, reliance on acquitted conduct violates the substance of the right to a jury trial.

3. The use of acquitted conduct at sentencing also ignores the difference between a crime and any other conduct considered by a court. A crime is not a traditional sentencing factor, but a legal creature composed of constituent elements, each of which must be proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 500 (Thomas, J., concurring) ("[I]n order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under *Winship*, proved beyond a reasonable doubt)."). This requirement is a "historically grounded right[] of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *In re Winship*, 397 U.S. 358, 362 (1970). Unlike other conduct, therefore, acquitted conduct must be proved beyond a reasonable doubt, and a jury's judgment of acquittal prohibits a court from considering the crime to be proved under a lower standard of proof. *See United States v. Gaudin*, 515 U.S. 506, 511 (1995) (the Constitution "gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged"); *cf. Mullaney v. Wilbur*, 421 U.S. 684, 696-97 (1975) (invalidating a state scheme lowering the burden of proof after the jury made a threshold finding of beyond a reasonable doubt).

4. The federal courts of appeals have based their decisions approving a trial court's reliance on acquitted conduct at sentencing on two grounds. *First*, courts have found that this Court's decision in *Watts*, 519

U.S. 148, bars any attack on the validity of the use of acquitted conduct at sentencing. *See, e.g., Horne*, 474 F.3d at 1006; *Gobbi*, 471 F.3d at 314. However, *Watts* addresses the practice only in the context of the Double Jeopardy Clause and, as the Court has explicitly recognized, did not address whether the use of acquitted conduct at sentencing violated the rights to a jury trial or due process. *Second*, courts, including the court below, have held that this Court remedied any constitutional problem by rendering the federal sentencing guidelines advisory in *Booker*, 543 U.S. 220. *See, e.g., Mercado*, 474 F.3d at 657-58; *High Elk*, 442 F.3d 622; *Magallanez*, 408 F.3d at 684-85. But that misses the fundamental constitutional problem: reliance on acquitted conduct undermines the right to a jury and due process even in a post-*Booker* world. Neither Watts nor Booker, therefore, resolves the question presented.

a. *Watts* was limited to the question whether sentencing based on acquitted conduct violated the Double Jeopardy Clause of the Fifth Amendment. The Court issued its decision in *Watts* without the benefit of full briefing or oral argument, *Watts*, 519 U.S. at 171 (Kennedy, J., dissenting), and reversed the decision of the court of appeals based only on "the implications of the Guidelines" and the appellate panel's "erroneous views of [the Court's] double jeopardy jurisprudence," *Id.* at 154. Nowhere in its limited decision did the Court address the permissibility of acquittal enhancements as a matter of due process or the right to a jury trial. See *id.* at 156-57 & n.2 (acknowledging a "divergence of opinion" among the circuit courts as to whether, in extreme circumstances, due process requires a higher standard of proof for uncharged conduct under the Due Process

Clause).

The fact that Watts failed to rule out all constitutional challenges to acquittal enhancements should no longer be a debatable proposition. Justice Stevens could not have been clearer in *Booker* that *Watts* did not address or resolve whether the Sixth Amendment permits punishment for acquitted conduct:

> In *Watts*, relying on *Witte*, we held that the Double Jeopardy Clause permitted a court to consider acquitted conduct in sentencing a defendant under the Guidelines. In neither *Witte* nor *Watts* was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment. The issue...simply was not presented."

Booker, 543 U.S. at 240. Thus, since the line of decisions culminating in *Booker* clarified the content of the jury right, this Court has provided the lower courts no guidance about whether the right to a jury is violated by acquitted-conduct enhancements.

It likewise remains an open question whether this practice violates a defendant's right to due process by permitting a defendant to be sentenced under a lower standard of proof for conduct the legislature has elected to identify as a crime, not as a sentencing enhancement, and that the jury has rejected. Although the Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986), held that consideration at sentencing of uncharged conduct under a preponderance standard "*generally* satisfies due process," *Watts*, 519 U.S. at 156 (emphasis added), the Court has not addressed the more specific question whether the consideration of *acquitted* conduct, in

conflict with a jury's verdict, satisfies due process.

b. The court below also erred in holding that the fact that the federal sentencing guidelines are now advisory following *Booker* eliminates the constitutional problem. That misses the point. Regardless of the sentencing scheme used, a trial court's express reliance on acquitted conduct in selecting the appropriate sentence violates a defendant's constitutional rights by contravening the findings of the jury. Although *Booker* permits district courts to consider relevant conduct in calculating an advisory Guidelines sentence, it does not address the unique concerns raised by acquittal enhancements. The constitutional violation occurred here when the district court relied on acquitted conduct in selecting a sentencing, in the same way as if the district court had relied on race, religion, or protected speech at sentencing. Just as a court is prohibited from relying on these unconstitutional factors, so too should the court be prohibited from relying on conduct for which a jury has found the defendant to be legally innocent. That is the question on which federal and state courts are divided, and that is the question warranting this Court's review.

At any rate, the advisory nature of the Guidelines under *Booker* hardly means that acquittal enhancements lack significance in the real world of federal sentencing. A sentencing court is still required to calculate a defendant's sentence under the Guidelines, and the resulting sentencing range can be deemed presumptively reasonable upon appeal. *See Rita v. United States*, 127 S. Ct. 2456, 2462 (2007). Instead of "returning us to the pre-Guidelines days when judges 'exercised something like a clinical judgment about the appropriate sentence,' *Booker* introduced a 'hybrid' system in which sentencing 'is

still profoundly influenced by the rules, namely the Guidelines.'" *Faust*, 456 F.3d at 1351 (Barkett, J., concurring) (quoting *Pimental*, 367 F. Supp. 2d at 151-52). As Mr. Tavarez's case illustrates, acquittal enhancements therefore frequently become the basis of actual, not merely hypothetical, increases in punishment.[5]

III. THE QUESTION PRESENTED IS AN IMPORTANT AND RECURRING ONE.

As this Court is aware, federal and state courts repeatedly face the question whether to consider acquitted conduct when imposing a sentence on a defendant. *See Watts*, 519 U.S. at 170 (Kennedy, J., dissenting) (noting that reliance on acquitted conduct in imposing sentences "raises a question of recurrent importance in hundreds of sentencing proceedings in the federal criminal system"). Given the deep conflict

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[5] In *Rita*, Justice Scalia went beyond acquitted conduct to argue that *any* increase in guidelines range was unconstitutional, even under the advisory scheme. He wrote separately to explain that, under the federal Sentencing Guidelines, "sentences whose legality is premised on a judge's finding some fact (or combination of facts)" violate the Sixth Amendment. 127 S. Ct. at 2476 (Scalia, J., concurring in part, concurring in judgment). Although not presented by the facts in *Rita*, Justice Scalia highlighted the situation in which "the district court imposes a sentence *within* an advisory Guideline range that has been substantially enhanced by certain judge-found facts." *Id.* at 2477. In that example, the hypothetical defendant had an advisory Guidelines range of 33 to 41 months based on the facts found by the jury. Under the Guidelines, the district court could find additional aggravating facts that produce a higher advisory guidelines range of 235 to 293 months. In that circumstance, the "judge-found facts" are "not merely facts that the judge finds relevant in exercising his discretion, they are the legally essential predicate for his imposition of the 293-month sentence." *Id.* Thus, in the absence of judicial factfinding, the "293-month sentence would surely be reversed as unreasonably excessive." *Id.*

between state and federal courts identified above, the day-to-day reliance on acquitted conduct by federal courts in sentencing countless defendants is intolerable and warrant's this Court's review.

The problem with acquittal enhancements also goes beyond their recurring nature. The question whether a defendant may be sentenced for conduct for which he was acquitted goes to the heart of the criminal jury system, and it impacts public confidence in the criminal justice system. Distinguished judges have remarked that the practice is "bizarre," *United States v. Concepcion*, 983 F.2d 369, 393 (2d Cir.1992) (Newman, J., concurring), and called it "jurisprudence reminiscent of *Alice in Wonderland*." *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring). Judge Barkett, concurring with such a sentence because she found herself bound by precedent remarked that "it perverts our system of justice to allow a defendant to suffer punishment for a criminal charge for which he or she was acquitted." *United States v. Faust*, 456 F.3d 1342, 1350 (11th Cir. 2006) (Barkett, J., concurring) (quotations omitted)). As one court summed up, "[t]he defendant . . . might well be excused for thinking there is something amiss." *United States v. Magallanez*, 408 F.3d 672, 683 (10th Cir. 2005).

Legal scholars have likewise explained that "[t]he message that a defendant may permissibly be punished for conduct for which a jury found him not guilty is so counterintuitive to ordinary citizens, that it cannot help but have a negative impact on public confidence in the criminal justice system." Barry L. Johnson, *If at First You Don't Succeed--Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 185 (1996). Another scholar urged

that acquittal enhancements should be abandoned based solely on the "negative public perception of sentencing someone based on conduct of which they were acquitted after a thorough examination in a full adversarial proceeding..." Marguerite A. Driessen, *Challenging the Irrelevant Acquittal*, 11 Geo. Mason L. Rev. 331, 353-354 (2002) ("To consider that perception is not to succumb to the unreasoned hysteria of the uninformed. It is to hear the legitimate concerns of those who practice with the system, who are all subject to the demands of the system, and from whom the powerful in this country get the right and the power to govern."); *see also* Bilsborrow, *supra*, at 333 ("Instead of instilling notions of democratic accountability in the criminal justice system, the message conveyed to jurors is that their fact-finding was trivial."); Harlan J. Protass, *Not Guilty? Go to Jail*, Nat'l L.J., Sept. 10, 2007 (col. 1) (arguing that "[a]cquitted conduct sentencing . . . goes against virtually everything we know and respect about the American criminal justice system"); Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 Suffolk U. L. Rev. 419, 433 (1999) ("There is something troubling about case law that minimizes the jury's unique contribution to the criminal justice process.");

This legal scholarship is not idle speculation. The editors of the Los Angeles Times observed after *Watts* that, "[n]ow, apparently, a jury's verdict of not guilty...can still mean guilty." *When Not Guilty Means Guilty: Supreme Court's Ruling on Sentences Raises Troubling Questions*, L.A. Times, Jan. 9, 1997, at B8. And in a recent story about a juror's reaction to discovering the practice of acquittal enhancements following a lengthy trial, one commentator noted that,

"[k]nown as acquitted and uncharged conduct sentencing, the practice is raising a sharp question among legal scholars: Should federal judges dole out tougher sentences based on accusations that jurors rejected or never heard during trial?" Jim McElhatton, *A $600 Drug Deal, 40 Years in Prison*, Wash. Times, Jun. 29, 2008, at A1. This Court should grant the petition to restore public confidence in the jury system.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

This case presents an ideal vehicle for addressing the question presented. Although it convicted him of two drug trafficking offenses, the jury acquitted Mr. Tavarez of possessing a firearm in furtherance of those offenses. See 18 U.S.C. § 924(c). Nevertheless, applying the Guidelines, the district court found more likely that not that Mr. Tavarez possessed a firearm in connection with the drug offense. See U.S.S.G. § 2K2.1(b)(6) & comment. (n.14). In other words, the district court found Mr. Tavarez guilty, by merely a preponderance of evidence, of the very same conduct of which the jury had acquitted him. That finding raised the sentencing range from 63 to 78 months to 78 to 97 months, and the district court imposed a sentence of 97 months – an increase of more than a year and a half above the sentence authorized by the jury's findings alone. Moreover, Mr. Tavarez adequately preserved his constitutional objections to his sentence, both at trial and on appeal. This case therefore squarely raises the question whether a trial court may rely on acquitted conduct in selecting a sentence to impose.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 30, 2008

APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-14039
Non-Argument Calendar

D. C. Docket No. 06-60360-CR-WPD

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDGARDO TAVAREZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(April 22, 2008)

Before: BIRCH, DUBINA and HULL, Circuit Judges.

PER CURIAM:

Edgardo Tavarez appeals his conviction and 97-month sentence for conspiracy to possess with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846. On appeal, Tavarez argues that the district court (1) abused its discretion in denying his motions for a mistrial and a new trial, and (2) erred in basing a two-level sentence enhancement on acquitted conduct. After review, we affirm.

I. BACKGROUND

A. Jury Trials

In a second superseding indictment, Tavarez was indicted, along with Mark Daniel Gutierrez, for (1) conspiracy to possess with intent to distribute 100 grams or more of heroin from on or about October 24, 2006 to January 23, 2007, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846 (Count One); and (2) possession with intent to distribute 100 grams or more of heroin on January 23, 2007, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B) (Count Two). Tavarez alone was indicted for (3) carrying a firearm on January 23, 2007 in relation to the drug offenses in Counts One and Two, in violation of 18 U.S.C. § 924(c)(1) (Count Three). Gutierrez pled guilty, but Tavarez pled not guilty. At his first trial, the jury found Tavarez not guilty on Count Three but could not reach a verdict on Counts One and Two. The district court declared a mistrial.

During Tavarez's second trial on Counts One and Two, Tavarez's counsel cross-examined Drug

Enforcement Agency ("DEA") Special Agent Anne-Judith Lambert. Tavarez's counsel asked Special Agent Lambert if Tavarez was "cooperative" at the time of his arrest. In reply, Special Agent Lambert testified that Tavarez was cooperative in that he did not resist arrest but that he was uncooperative in that he refused to give information, as follows:

> Q. But as far as how [Tavarez] was arrested, he walks downstairs, gets into a truck and he is notified he is under arrest, correct?
> A. Yes, he is.
> Q. He is cooperative, correct?
> A. Yes.
> He doesn't resist arrest if that's what you mean.
> Q. He doesn't try to run, makes no f[u]rtive movement with his hands, correct?
> A. No.
> Q. And his girlfriend allows a search of the house, correct – of an apartment?
> A. I was told that, but I can't testify to that because I was not there for the search.
> . . .
> Q. This may sound crazy, but if the defendant was cooperative when he got arrested, if his girlfriend said, sure, go ahead and search my residence, did it ever dawn on you or anybody else in the Justice Department to say: Can we search your house?

> A. I don't know what you mean when you say "cooperated." He didn't resist arrest. And, no, he did not cooperate because he refused to give information.

Tavarez's counsel then moved for a mistrial, arguing that Special Agent Lambert had commented on Tavarez's constitutional right to remain silent. Tavarez's counsel argued he was very clear in his questioning that he was asking about Tavarez's physical movements and not about Tavarez's speaking to the police. The district court denied the motion, stating "I don't know that she commented on your client's right to remain silent. If she did, you opened the door."

The jury found Tavarez guilty on Count One (heroin conspiracy) and not guilty on Count Two (heroin possession). Following the jury verdict, Tavarez's counsel moved for a new trial. Tavarez's new trial motion argued that Special Agent Lambert's statement should not have been permitted. The district court denied the motion on the basis that: (1) the mere mention of post-arrest silence does not result in a mistrial; (2) there was no due process violation, particularly where the trial evidence was strong; and (3) Special Agent Lambert's testimony was not necessarily unresponsive to the defense counsel's line of questioning.

B. Sentencing

Tavarez's Presentence Investigation Report ("PSI") assigned him a base offense level of 26,

pursuant to U.S.S.G. § 2D1.1(a)(3) and (c)(7), because the offense involved at least 100 grams of heroin. The PSI assigned a two-level enhancement, pursuant to U.S.S.G. § 2D1.1(b)(1), because a firearm was involved, resulting in a total offense level of 28.[1] With a criminal history category of I, Tavarez's advisory guidelines range was 78 to 97 months' imprisonment.

Tavarez filed objections to the PSI, including an objection to the two-level firearm enhancement because he was acquitted of Count Three, i.e., carrying a firearm in relation to the drug offenses in Counts One and Two. At his sentencing hearing, Tavarez argued that his drug conspiracy indictment (Count One) did not mention a firearm, that there was no evidence connecting the firearm to the drug conspiracy, and that using the firearm to enhance his sentence would nullify the jury's decision that he was not guilty of the firearm charge in Count Three. The government replied that possession of the firearm was relevant conduct and that it had established Tavarez's possession of the gun during and in relation to the drug conspiracy by a preponderance of the evidence.

The district court noted that *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633 (1997), allows a district court to consider acquitted conduct proven by a preponderance of the evidence in fashioning an appropriate sentence. The district court concluded

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[1] 1U.S.S.G. § 2D1.1(b)(1) mandates the two-level enhancement "[i]f a dangerous weapon (including a firearm) was possessed."

that the gun was part of Tavarez's relevant conduct. The district court overruled Tavarez's objection and sentenced him to 97 months' imprisonment. Tavarez filed this appeal.

II. DISCUSSION

A. Motions for Mistrial and New Trial

On appeal, Tavarez first argues the district court abused its discretion in refusing to grant his motions for a mistrial or a new trial because Special Agent Lambert's testimony that Tavarez refused to give information was intended to refer directly to Tavarez's post-arrest silence.[2] He argues that the reference was not invited by counsel, because it was clear that when counsel referred to Tavarez as "cooperative," he was referring to the fact that Tavarez did not try to flee from the police.

The use of a defendant's post-*Miranda*[3] silence for impeachment purposes violates the defendant's due process rights. *See Doyle v. Ohio*, 426 U.S. 610, 617, 96 S. Ct. 2240, 2244 (1976) ("[I]t would be fundamentally unfair and a deprivation of due process to allow [an] arrested person's silence to be used to impeach an explanation subsequently offered

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[2] We review a district court's refusal to grant a mistrial, based on a comment regarding a defendant's right to remain silent, for abuse of discretion. *See United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999). We also review the denial of a motion for a new trial for abuse of discretion. *United States v. Lee*, 68 F.3d 1267, 1273 (11th Cir. 1995).

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

at trial."). However, comments on post-arrest, but pre-*Miranda*, silence do not violate due process. *See Fletcher v. Weir*, 455 U.S. 603, 605-07, 102 S. Ct. 1309, 1311-12 (1982); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). "To determine whether there has been an impermissible comment upon a defendant's right not to testify at trial, the district court must consider . . . whether the statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of an accused to testify." *United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999).

Here, we are persuaded that the district court did not abuse its discretion in denying Tavarez's motions for a mistrial and a new trial. First, the record is unclear as to whether Tavarez's refusal to give information that was referenced by Special Agent Lambert was before or after he received *Miranda* warnings.[4] Second, and in any event, Special Agent Lambert made the statement about Tavarez refusing to provide information in direct response to a question during cross-examination by defense counsel. And, the prosecution later made no further argument or inquiry regarding the statement. *See United States v. Stubbs*, 944 F.2d 828, 835 (11th

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[4] Although Special Agent Lambert's comment referenced Tavarez's refusal to give information in relation to his arrest, Special Agent Lambert gave no testimony about when or whether Tavarez was read his *Miranda* rights during the arrest. Prior to Special Agent Lambert's testimony at trial, another DEA agent, Kimberly Elliott, testified that although she did not read Tavarez his *Miranda* rights at the time of his arrest, they were read by "an agent."

Cir. 1991) ("While a single comment alone may sometimes constitute a Doyle violation . . . a single mention does not automatically suffice to violate defendant's rights when the government does not specifically and expressly attempt to use . . . the improper comment to impeach the defendant.").

Further, Special Agent Lambert's statement was given in response to her apparent confusion over what defense counsel meant by Tavarez being "cooperative." *See Chastain*, 198 F.3d at 1351 ("[T]he court must consider the circumstances in which the statement was made."). A jury would not necessarily interpret Special Agent Lambert's statement as a reference to Tavarez's exercise of his right to remain silent, but rather as an answer to Tavarez's attorney's assertion that Tavarez was "cooperative." *See United States v. Dodd*, 111 F.3d 867, 869 (11th Cir. 1997). Thus, Tavarez has not shown that Special Agent Lambert's statement was "manifestly intended" to be a comment on Tavarez's exercise of his right to remain silent. *See Chastain*, 198 F.3d at 1351. For all of these reasons, we conclude that Special Agent Lambert's statement in this case does not constitute a Doyle violation.[5]

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[5] At any rate, even assuming a *Doyle* violation, such a violation "is harmless if the error had no 'substantial and injurious effect or influence in determining the jury's verdict.'" *United States v. Miller*, 255 F.3d 1282, 1285 (11th Cir. 2001) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 1714 (1993)). We agree with the district court that the government's evidence was strong, and the witness's lone comment, in light of all the other evidence presented, did not materially affect the jury's verdict.

B. Firearm Enhancement

As to the firearm enhancement, Tavarez argues our holding in *United States v. Duncan*, 400 F.3d 1297 (11th Cir. 2005), should be overturned because such an enhancement violates the Fifth and Sixth Amendments and the principles of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005).[6] In *Duncan*, this Court held that *Booker* does not prohibit courts from considering relevant acquitted conduct in an advisory guidelines system as long as a court does not impose a sentence that exceeds what is authorized by the jury verdict. *Duncan*, 400 F.3d at 1304-05. Tavarez's 97-month sentence does not exceed the statutory maximum of 40 years for his drug conspiracy conviction in Count One. *See* 21 U.S.C. § 841(a)(1), (b)(1)(B)(i) and 846; *Duncan*, 400 F.3d at 1304-05. As Tavarez himself recognizes, we are bound by our precedent in *Duncan*. *See United States v. Marte*, 356 F.3d 1336, 1344 (11th Cir. 2004) (noting that only the Supreme Court or this Court sitting *en banc* can judicially overrule a prior panel decision).

Here, the district court properly enhanced Tavarez's sentence based on its finding that the government established a connection between Tavarez's drug conspiracy offense conduct and his possession of a firearm by a preponderance of the evidence, even though Tavarez was acquitted of the same charge at trial. The record also amply

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[6] We review constitutional challenges to a sentence *de novo*. *United States v. Cantellano*, 430 F.3d 1142, 1144 (11th Cir. 2005).

supports the district court's application of the enhancement. The district court concluded Tavarez had the firearm with him "for protection." Tavarez possessed the loaded Glock-9mm pistol, which was registered to him, while he was involved in a drug sale and while he was in his truck with $4,000 of pre-recorded buy money and another two ounces of heroin.

For all of the foregoing reasons, we affirm Tavarez's conviction and sentence.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	CASE NO. 06-60360-CR-WPD
Plaintiff,	)	
-v-	)	
EDGARDO TAVAREZ,	)	Fort Lauderdale, Florida
Defendant.	)	August 16, 2007 10:32 a.m.

TRANSCRIPT OF SENTENCE

BEFORE THE HONORABLE WILLIAM P. DIMITROULEAS

U. S. DISTRICT JUDGE

APPEARANCES:

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For the Defendant: SCOTT B. SAUL, ESQ.
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(Call to order of the Court.)

THE COURT: United States versus Edgardo Tavarez.

MR. THOMPSON: Good morning, Your Honor. Terry Thompson on behalf of the United States.

MR. SAUL: Good morning. Scott Saul on behalf of Edgardo Tavarez.

THE COURT: And Mr. Tavarez is present?

MR. SAUL: Yes, he is.

THE COURT: Mr. Tavarez is before the Court having pled -- excuse me -- having been found guilty of conspiracy to possess with the intent to distribute 100 or more grams of heroin.

I adjudicated him guilty, deferred sentencing, ordered a Presentence Investigation Report that I have received and reviewed.

Have counsel had an opportunity to review the Presentence Investigation Report, Mr. Thompson?

MR. THOMPSON: Yes, Your Honor.

THE COURT: Mr. Saul?

MR. SAUL: Yes, Your Honor.

THE COURT: Any objections to the Presentence -- let me ask Mr. Tavarez.

Mr. Tavarez, have you had an opportunity to review the Presentence Investigation Report and discuss it with your lawyer?

(Pause.)

THE DEFENDANT: Yes, sir.

THE COURT: You have read the Presentence Investigation Report?

THE DEFENDANT: Yes.

THE COURT: And discussed it with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

Any objection to the Presentence Investigation Report from the Government?

MR. THOMPSON: No, Your Honor.

THE COURT: Mr. Saul?

MR. SAUL: Yes, Judge.

I filed written objections to the Presentence Investigation.

THE COURT: Okay.

You may proceed on those.

MR. SAUL: Generally outside of what I provided in writing, there is nothing more for me to say with the exception concerning Probation's applying the gun enhancement. The actual Indictment for the conspiracy doesn't address any issues concerning a gun. My client was acquitted on it. There is no proof that the gun had any connection to the conspiracy. And pursuant to the verdict, the Constitution, Apprendi, to apply an enhancement would nullify whatever happened in court and would add something that is not part of the charging document.

THE COURT: What's the Government's position on the gun enhancement?

MR. THOMPSON: Whether or not the Government -- the gun had ever been charged, it's the Government's position it would have been relevant conduct. And the evidence in this case established by more than a preponderance of the evidence that the firearm was possessed during and in relation to the drug offense. He possessed the firearm on his person on January 23rd, the date of the last of a series of drug transactions. He

possessed the drug -- the gun on his person at the same time that he was in possession of the --I believe it was $4,000 or $4,600 from the first of a series of drug buys that were supposed to occur that day. He observed -- he possessed that gun while meeting with co-defendant Derrick Santos to provide Santos with heroin for the first of the transactions -- actually the first two of the transactions and while getting the buy money from Santos.

And the January 23rd series of transaction was planned after the December incident in which the defendants had lost in excess of 110 grams of heroin.

And all those facts, I believe, establish by a preponderance of the evidence that the weapon is relevant conduct.

THE COURT: The next objection, Mr. Saul?

MR. SAUL: Judge, all my other objections I will just rely on the written memorandum that I submitted to the Court.

THE COURT: Any legal cause to show why sentence should not be imposed?

MR. SAUL: No.

My client does want to address the Court.

You have several people that have come to court to express their support for Mr. Tavarez.

If all the people that are here for Edgardo Tavarez can please stand up.

Judge, these are all family members and friends. Some people have traveled far to be here.

All of them would state that Mr. Tavarez has always been a law-abiding citizen. He has always been generous, has essentially acted as a patriarch towards his family and helped people.

There are two people that specifically would like to address the Court about Mr. Tavarez. The first one would be his mother, Maria Tavarez. The second one would be his cousin, Carol Rodriguez.

I seek permission to have Maria Tavarez approach the Court.

THE COURT: All right.

MR. SAUL: Do you want her placed under oath?

THE COURT: Sure.

MARIA TAVAREZ, DEFENDANT'S WITNESS, SWORN.

THE CLERK: Please state your name and spell your last name for the record.

THE WITNESS: My name is Maria Tavarez, M-a-r-i-a T-a-v-a-r-e-z.

THE COURT: Okay.

MR. SAUL: Ms. Tavarez, you are the mother of Edgardo, correct?

THE WITNESS: Yes.

MR. SAUL: You live locally hear, correct?

THE WITNESS: Yes,

MR. SAUL: And you watched the whole trial, correct?

THE WITNESS: Yes.

MR. SAUL: What would you like to say to this Court to influence or act as an advocate on behalf of your son?

What should this Judge know about your son when issuing a sentence against him?

THE WITNESS: Okay.

About my son, starting with his birth. He was premature, three pounds. I always tried to make the best life for him because like he was premature.

The first thing that I was teaching my kids is not to use drugs, not to do nothing bad to their body, especially to him because he was convulsion (phonetic) when he was six months.

The second thing is to be a good person, have a good personality, be a successful person, to help everybody.

I feel now -- I feel disappointed with myself right now because I was the one teaching him that he has to help everybody. So I was trying to teach him the best in a person is to give away what we have, because that's the way that my mom raised us. I come from a family with six girls (phonetic). We don't got no boys. So I (unintelligible). It was too much (unintelligible).

Like as a mother -- he is a beautiful person. And I don't -- I mean I don't want that he have (unintelligible) bad for all this just because he was trying to help somebody else.

I need him because I got Chron's disease. He live with we -- or I live with him.

What I have is because I get divorced. I sold my house. And I cannot live by myself, so I move with him and I put all my money in the house that we have now. I cannot support my house because I cannot work.

I get also -- how do you call --- I got gangrene almost in my foot. I almost passed away twice.

I have got two kids more, but he was the only one next to me day by day taking me to the hospital, taking me to the doctor. He was in my life for everything.

The same for everybody in my family. He be close to everybody, to his cousin, nephew.

For my granddaughter, she call him "Daddy" to everybody because he don't have no kids.

But for us he is like our father because he has been there giving all the support. He even was there and I -- because was there when my mom was dying. I couldn't be next to her bed, and he told me, "Mom, I am going to be there. I am not going to let grandma go by herself."

And my son -- I said, "Thank you because you was there for me."

Without him I am going to lose everything because I cannot support myself. What I have is $500 for my alimony. I do hair, but I cannot stand for a long time. So its not that much money that I can make. I need him to help me.

And the only thing that I can ask you, I know you are a good man because I have been hearing you for other persons. And I am going to beg you to consider that Edgardo Tavarez has been a nice person and with a beautiful heart.

On behalf of my family and my other kids, I ask you to consider that he is not a bad person in the street. He is not going to be any criminal in the street because, first of all, I am afraid to police, I am afraid to the Court, I am afraid because I come from a mother with six girls. We never went through any of this. And I hope never in my life to walk through the court.

Thank you.

THE COURT: I appreciate your being here today. I am sure your son appreciates the support that you are giving him.

MR. SAUL: One other person.

Carol Rodriguez.

CAROL RODRIGUEZ, DEFENDANT'S WITNESS, SWORN.

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Carol Rodriguez, R-o-d-r-i-g-u-e-z. Good morning, Your Honor.

Your Honor, I am here on behalf of the Court to represent my family and what Edgardo Tavarez means to our family.

Edgardo Tavarez is in all our family events, being Thanksgiving, being Christmas, birthdays, picnics. Anything that our family does, he is there. He has never missed a birthday of any of our children, of our cousins, of our aunts or uncles.

He is a family man. He is a person that you could definitely go to if you want to hear positive things and positive outlooks on things.

I believe in seconds chances because I have had some myself. So I want to address that he is a good person. He doesn't pose any threat to society. I mean he has so many people who love him and truly love him.

And I want to thank you for -- and I want you to please show leniency on this case and please try to just come from your heart and think that you could

give a man a second chance at life of again, because once you lose that second chance, it's not the same.

So I want to just tell you that our family needs him and we are very united. We are a very united family.

Like my aunt said, my grandmother passed away last year and he never left her bedside. I mean that truly shows you a man with a good heart.

Thank you.

THE COURT: I appreciate you being here today.

MR. SAUL: I would like to ask of this Court are you going to make rulings on my objections?

THE COURT: After I hear from Mr. Tavarez.

MR. SAUL: Okay. Because that is going to impact how I speak to the Court.

THE COURT: Why don't we hear from Mr. Tavarez.

I will rule on the objections and then you can argue further.

MR. SAUL: Okay.

Do you want him to speak just from there?

THE COURT: It doesn't matter.

THE DEFENDANT: Good morning, Your Honor.

THE COURT: Good morning.

THE DEFENDANT: Your Honor, I am just standing in front of you today to tell you -- to say really I take what the jury said and respect Your Honor. I am going to go down to the next level to try to appeal, you know. I don't want you to take this -- make a scene like I am a bad person. You understand, Your Honor, because I didn't do this. And they really found something that really didn't have to do with me. You understand? I was just trying to help somebody and I did the wrong thing. I am sorry for helping somebody. I didn't know it was going to cause me a big problem like this, Your Honor.

I ask you to have leniency on me and not treat me like I am a criminal.

THE COURT: Anything further you want to say, Mr. Tavarez?

THE DEFENDANT: That will be all, Your Honor.

THE COURT: Well the jury found that you are a criminal, so, you know -- and I have adjudicated you guilty, so you are a convicted felon.

And I don't doubt that you are a nice person. I don't doubt that you are a good family person. And those are all things that I can take into account in determining what a reasonable sentence is.

THE DEFENDANT: Yes, sir.

THE COURT: But as far as you being a criminal, the jury has found that you are a criminal. And unless the Eleventh Circuit says the jury was wrong or I was wrong, you will remain a criminal. And that's just something that you will have to live with.

THE DEFENDANT: I understand.

THE COURT: As far as the objections go, I mean I heard both trials and I heard the evidence regarding both trials. I think that the acquitted conduct is something that the Court can take into account in deciding by a preponderance of the evidence what a reasonable sentence is. And I think it's United States versus Watts that allows a District Judge to consider acquitted conduct by the preponderance of the evidence standard in determining facts that will be utilized in deciding what a reasonable sentence is, particularly now that the guidelines are advisory, not mandatory.

Maybe the U.S. Supreme Court is going to change the law in the future, but the way read the law under United States is versus Booker and the Eleventh Circuit opinion, United States versus Duncan, that sentencing courts can rely upon the preponderance of the evidence standard in determining relevant conduct even when there were acquittals involved.

And consequently I find that the gun was part of this conspiracy charge. It was there for protection. It was in the truck with Mr. Tavarez with the $4,500

or so that had come from the cousin in payment for the first part of the drug deal with the 68 grams of cocaine that was hidden in the door of the truck. So I think that the gun was part of the relevant conduct and he is responsible for it, and the increase under 2(d)1.1(b)(1) is appropriate. So I overrule the objection.

As to the drugs that were in the truck also on that date that the jury ostensibly acquitted him on -- assuming that they acquitted him on it -- and that the conspiracy charge doesn't cover that amount of drugs, I still find by a preponderance of the evidence that it was part of the relevant conduct and hold Mr. Tavarez responsible for that amount of drugs. Even though it wouldn't change the guidelines, I think if it was -- the 68 or so grams were subtracted, I still find that they are part of the relevant conduct.

So I overrule the objection, which gives us an offense level 28, criminal history category 1, is that correct?

MR. THOMPSON: Yes, Your Honor.

MR. SAUL: Yes, Your Honor.

THE COURT: And the Government didn't ask for obstruction of justice in this case, is that correct?

MR. THOMPSON: No, Your Honor. There was an objection to a reference by the Probation Office to the Government's position regarding obstruction, and it is the Government's position that the defendant did perjure himself before this Court, and it simply -- we did not object to the PSI, but it

simply is something that the Government's going to take into consideration --

THE COURT: You are not --

MR. THOMPSON: We are not asking for it, Your Honor. We are just going to take it into consideration what sentence to recommend to the Court.

THE COURT: You are not asking for the two-level enhancement?

MR. THOMPSON: No, Your Honor.

THE COURT: Okay.

All right. So we are at an offense level 28, criminal history category 1.

Mr. Saul.

MR. SAUL: Judge, there --

THE COURT: Just for the record, that's a range of 78 to 97 months, is that correct?

MR, SAUL: Yes, Your Honor.

THE COURT: Okay. Go ahead.

MR. SAUL: I am asking you to sentence Mr. Tavarez to 78 months, which is the low end of the guidelines for the following reasons: He has no criminal history.

Also, you heard at trial two times, you saw the demeanor of Mr. Tavarez. He showed the utmost respect to the courtroom. He acted like a complete gentleman throughout the proceedings.

I don't think that you can view Mr. Tavarez as beyond reproach. I think you are seeing an extraordinary amount of support. When the mother was testifying and she was in tears, I hope the Court was able that see that many of these family members were in tears, too. So this was not some type of, you know, fodder for the defense, but these people were speaking from the heart.

I respect the jury's verdicts, but I think, not for sentencing purposes of mitigation, but I think this particular crime was an aberration in an otherwise law abiding and productive life, and I am asking you to give this young gentleman an opportunity to come out and straighten himself out. And, therefore, if 78 months is the low end of the guidelines, then I think that would be a fitting sentence for this situation.

THE COURT: Anything further before I impose sentence?

MR. THOMPSON: Your Honor, the United States would just recommend a sentence at the top end of the guidelines. This was a series of drug transactions, not an aberration, a series of drug transactions that took over -- took place over a three-month period. There was a gun involved. And the defendant on two occasions provided medacious testimony to this Court.

THE COURT: Anything further before I impose sentence?

MR. SAUL: No.

MR THOMPSON: No.

THE COURT: Having considered the factors in 18 United States Code, Section 3553(a), and having considered the advisory guideline range, it's up to the Court to determine what a reasonable and sufficient sentence is.

People are suggesting that Mr. Tavarez should get a seconds chance. I think he got the second chance when he got charged in federal court. Ironically the penalties in federal court are a lot less severe than they would have been in state court. He could have been charged with trafficking in heroin in state court, and for this amount of heroin, this amount of conspiring to possess with the intent to deliver over 28 grams of heroin in state court carries a 25-year mandatory minimum. So he got his break when he was charged in federal court.

The Government hasn't asked me to impose an enhancement for obstruction of justice.

I take notes when the trial is going on, and I wrote down during Mr. Tavarez's testimony -- on redirect examination he was asked: Is that your voice on the speaker phone call?

The answer: It doesn't sound like me.

Again the question: Is that your voice?

No.

It sure sounded like his voice to me, and I think that Mr. Tavarez was less than candid when he had that testimony in front of this Court.

The Government hasn't asked for obstruction of justice. I am not going to do it on my own, but I agree with the Government that that's a factor that the Court can take into account in deciding what a reasonable sentence is, what a sufficient sentence is.

I take into account the fact that he is a good family man, but those factors don't counterbalance the crime that he was involved in in this case.

I don't know of a controlled substance that is more devastating and debilitating to our society than heroin, and people that traffic in heroin have to be prepared to pay the consequences.

Consequently I find that a reasonable and sufficient sentence in this case is the top end of the guideline range.

It will be the judgment of the Court and sentence of law that Mr. Tavarez be sentenced to 97 months in prison.

Upon his release from prison I place him on five years of supervised release. While on supervised release he shall not commit any crimes, he shall be prohibited from possessing a firearm or other dangerous device, he shall not possess any controlled substances, he shall comply with the standard conditions of supervised release, including the

special condition that he provide complete access to financial information to his probation officer.

I also order that he maintain full-time legitimate employment and provide documentation of that to his probation officer.

I also order that he maintain prior -- that he obtain prior written approval from the Court before entering into any self-employment.

And, finally, I order that he submit to a reasonable search of his person or property conducted in a reasonable time and manner by his probation officer.

I find that he is not able to pay a fine. I waive the fine; impose $100 special assessment.

Mr. Tavarez, it's my duty to inform you that you have ten days within which to appeal the judgment and sentence of this Court. Should you desire to appeal and be without funds with which to prosecute an appeal, an attorney will be appointed to represent you in connection with that appeal.

Should you fail to appeal within that ten-day period, it will constitute a waiver of your right to appeal.

It's also my duty to elicit from counsel for all parties fully articulated objections to the Court's findings fact and conclusions of law as announced at this sentencing hearing and to further elicit any objections which any party may have to the manner in which the sentence was imposed in this case.

Are there any objections from the Government?

MR. THOMPSON: No, Your Honor.

THE COURT: Mr. Saul?

MR. SAUL: No Your Honor.

THE COURT: Mr. Saul filed a motion to withdraw for appellate purposes.

Have you had a chance to talk with Mr. Tavarez about that yet, Mr. Saul?

MR. SAUL: Yes.

I spoke to him and his family about it.

THE COURT: All right.

I note that Mr. Saul filed a notice of a permanent appearance of counsel back on January the 26th of 2007.

In spite of that, Mr. Tavarez, do you agree with Mr. Saul's motion to withdraw and for you to get a different lawyer to handle the appeal?

THE DEFENDANT: Yes, sir.

THE COURT: Are you going to hire your own lawyer to handle an appeal or do you want me to consider appointing a lawyer to represent you?

THE DEFENDANT: I got to talk to my family first.

THE COURT: Okay.

You got to let me know. If you don't have the money to hire a lawyer, then I will consider appointing one.

But are you going to file the Notice Of Appeal, Mr. Saul?

MR. SAUL: Yes, I will.

And the father just motioned to me to please appoint a public defender.

THE COURT: It's not the fathers decision, it's Mr. Tavarez's decision. It may wind up being the father's decision if he is the one that would pay for it, but --

(Pause.)

MR. SAUL: He is now in agreement with me to appoint the Public Defender.

THE COURT: Do you have money of your own, Mr. Tavarez, to hire a lawyer to handle the appeal?

THE DEFENDANT: No, sir.

THE COURT: Does the Government have a position on my appointing an appellate lawyer for Mr. Tavarez?

MR. THOMPSON: Just that the Public Defender's Office has a conflict, Your Honor.

THE COURT: I would appoint a CJA lawyer if I did it.

MR. THOMPSON: That's fine.

MR. SAUL: I will file the Notice Of Appeal this afternoon.

THE COURT: All right.

And I will pick a lawyer out from the list of appellate lawyers and send a copy of that to Mr. Saul.

And you will let Mr. Tavarez know who his plaintiff appellate lawyer is going to be?

MR. SAUL: I shall.

THE COURT: All right.

The Marshal will execute the sentence of the Court. Good luck to you, Mr. Tavarez.

(Pause.)

MR. SAUL: Judge, my client is asking me to ask you to allow my client one minute to talk to his family.

THE COURT: That's up to the marshal. I don't get involved. He is in the marshal's custody.

(Proceedings concluded at 10:50 a.m.)

REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and accurate transcript of the proceedings recorded by me and reduced to typewriting at my direction.

Court Reporter

Robert Ryckoff
s/Robert Ryckoff

Date: 10-27-08

APPENDIX C

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JUL 02 2008

THOMAS H. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-14039-CC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

EDGARDO TAVAREZ,
Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: BIRCH, DUBINA and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/Frank M. Hull
UNITED STATES CIRCUIT JUDGE